

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

35

FILE: [REDACTED]
EAC 04 055 51417

Office: VERMONT SERVICE CENTER

Date: AUG 12 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits additional evidence, including a letter from a certified public accountant.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 27, 2001. The proffered wage as stated on the Form ETA 750 is \$65,000 per year. On the Form ETA 750B, signed by the beneficiary on November 14, 2003,¹ the beneficiary did not claim to have worked for the petitioner. Other materials in the record indicate that the beneficiary began working for the petitioner in December 2003.

On the petition, the petitioner claimed to have been established on March 24, 2000, to have a gross annual income of \$800,000, net annual income of \$50,000, and to currently employ 11 workers. In support of the petition, the petitioner submitted what counsel identified as a "Corporate Tax Return." The document in question is not a Form 1120 U.S. Corporation Income Tax Return, but rather a Form 941 Employer's Quarterly Federal Tax Return. This document does not show the petitioner's income or expenses, but rather the wages paid to the petitioner's employees and the taxes withheld from those wages.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements from 2001, 2002 and 2003.

¹ The date does not match the filing date because the beneficiary is a substituted alien, rather than the original alien named on the initial ETA 750A.

In response, the petitioner submitted copies of its Form 1120 and 1120-A Corporate tax returns for the petitioner for the years requested.

The tax returns reflect the following information for the following fiscal years:

	5/2001-4/2002	5/2002-4/2003	5/2003-4/2004
Gross receipts	\$325,949	\$188,131	\$401,251
Total income [gross profit]	325,949	188,131	401,251
Taxable [net] income	2,247	1,128	1,413
Non-officer salaries and wages	135,484	110,821	235,278
Current assets	21,764	13,557	14,815
Total assets	21,764	23,519	24,777

The 2002-2003 return does not show a figure for current assets, but the 2003-2004 return shows \$13,557 as the petitioner's current assets at the beginning of the tax year and, therefore, at the end of the preceding tax year. The petitioner claimed no current liabilities on any of its tax returns.

In addition, counsel submitted copies of the petitioner's checking account statement dated August 31, 2001, showing a balance of \$15,630.24. The petitioner also submits copies of the beneficiary's semimonthly pay stubs from January 16, 2004 to September 16, 2004 (the petitioner hired the beneficiary shortly after the Form I-140 was filed). The pay stubs are each in the amount of \$2,916.66, which annualizes to just under \$70,000 per year.

The pay stubs show that the petitioner has paid the beneficiary in excess of the proffered wage during 2004, but this does not establish the petitioner's ability to pay from 2001 to 2003. The tax returns show insufficient income, and insufficient current assets, to cover the beneficiary's salary during those years. According to the tax returns, the petitioner's entire assets, current and otherwise, never exceeded \$25,000.

The director denied the petition, having determined that the evidence submitted did not establish that the petitioner had the ability to pay the beneficiary's proffered wage prior to the beneficiary's hiring in late 2003. On appeal, [REDACTED] the petitioner's administrative manager, states:

We have engaged [REDACTED] CPA to perform an analysis of our ability to pay the proffered wage. He has determined that . . . the accounting method used to prepare our federal income tax returns does not adequately demonstrate the net current assets which USCIS uses as a measure to determine the ability to pay the proffered wage. As fully discussed in his attached letter and analysis, it was determined that if we had chosen the accrual method of accounting, our net current assets would have been more than sufficient to pay the beneficiary the offered wage from [the] priority date until the most recent period available.

[REDACTED] states that, because the petitioner used the cash method rather than the accrual method, the petitioner's current assets at the end of each fiscal year did not take into consideration the petitioner's accounts receivable, which amount to \$51,740 for the 2001 tax year, \$61,029 for 2002, and \$111,907 for 2003. [REDACTED] states that these amounts, added to the current assets already reported on the tax returns, show that the petitioner had sufficient current assets in each of the three tax years.

Rather than simply claiming the ability to pay, the petitioner submits copies of invoices showing services rendered before the end of each tax year, and bank statements reflecting deposits to show that payment was collected afterward.

The invoices submitted represent monies *due* to the petitioner, rather than funds *already available* to the petitioner for use in paying the beneficiary's salary. Regarding the petitioner's bank statements, no evidence was submitted to demonstrate that the funds reported on the bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not employ the beneficiary until several years after the filing of the labor certification.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Here, the petitioner's net income as reported on the tax returns is only a small percentage of the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.²

As originally reported, the petitioner's current assets were not sufficient to cover the proffered wage. The petitioner initially reported no current liabilities. Now, on appeal, [REDACTED] that the petitioner's net current assets rise substantially if calculated by the accrual method rather than the cash method.

The petitioner's choice of tax accounting methods accords income either to the year during which it was earned or the year during which it was received. The accountant implies that the petitioner has reported income when it is received, consistent with cash convention, but urges that the amount on the tax return be amended to include income earned during a given fiscal year but not received during that year, which would be consistent with accrual. The petitioner's choice of accounting methods has attributed income to various years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner's present purpose. Changing from the cash method to the accrual method may change the year-to-year distribution of the petitioner's current assets, but the petitioner has not demonstrated that changing from cash to accrual method would make available tens of thousands of dollars that would otherwise never have appeared on the tax return at all.

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Furthermore, if the petitioner argues that we should take into account substantial amounts of previously unreported accounts receivable, then it stands to reason that the petitioner should also document its previously unreported accounts payable. [REDACTED] contends that the petitioner's accounts receivable add to the petitioner's current assets, but we cannot know the petitioner's *net* current assets without a complete and accurate picture of the petitioner's accounts payable as they stood at the time for which accounts receivable are calculated. We reject the implied assertion that we must consider the petitioner's newly claimed accounts receivable without any information regarding the petitioner's accounts payable or other current liabilities that would offset some or all of the petitioner's gross current assets.

The petitioner did not begin to pay any wages to the beneficiary until December 2003. The petitioner's 2001-2003 tax returns do not show sufficient net income or net current assets to cover the beneficiary's salary, and these documents, therefore, do not demonstrate the petitioner's ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage between the August 27, 2001 filing date and the beneficiary's actual December 2003 hiring date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.